85-907

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ZELLMER FROMM and MARILYN TUCKER,

Petitioners,

v.

EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES A. ROONEY
134 North LaSalle Street
Suite 720
Chicago, Illinois 60602
(312) 332-2600
Attorney for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1. Does the doctrine of comity bar federal jurisdiction of petitioners' action for damages and/or declaratory relief brought pursuant to 42 U.S.C. §1983?
2. Were petitioners denied due process of law in the state court proceeding filed against their property to determine the validity of the 1980 state tax lien on that property?

PARTIES TO THE ACTION

1. *Petitioners*:
   A. ZELLMER FROMM;
   B. MARILYN TUCKER.
2. *Respondents*:
   A. EDWARD J. ROSEWELL, Treasurer and Ex-Officio Collector of Taxes in Cook County, Illinois;
   B. THOMAS C. HYNES, Assessor of Cook County, Illinois;
   C. HARRY H. SEMROW, Commissioner of the Board of (Tax) Appeals of Cook County, Illinois;
   D. PATRICK QUINN, Commissioner of the Board of (Tax) Appeals of Cook County, Illinois;
   E. RICHARD M. DALEY, State's Attorney of Cook County, Illinois;
   F. The COUNTY OF COOK, a body politic and corporate of the State of Illinois; and
   G. ROBERT J. DEMPSEY, Judge of the Circuit Court of Cook County, Illinois.

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In The

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October Term, 1985

ZELLMER FROMM and MARILYN TUCKER,

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v.

EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The district court issued opinions upon the dismissal of the action and upon the denial of the petition for reconsideration. Both are unreported but are included in the Appendix to this Petition.

The opinion of the circuit court is reported at *Fromm v. Rosewell*, 771 F.2d 1089 (7th Cir. 1985). That opinion is also included in the Appendix to this Petition.

JURISDICTION

Judgment was entered by the circuit court on August 29, 1985.

The petition for rehearing was denied on October 2, 1985.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED*

United States Constitution

The Due Process Clause of the Fourteenth Amendment.

Federal Statutes

28 U.S.C. §1331
28 U.S.C. §1341 (The Tax Injunction Act)
28 U.S.C. §1343
28 U.S.C. §2201
42 U.S.C. §1983 (The Civil Rights Act)

Illinois Constitution

Article IX, section 4(a)

Illinois Statutes (1983 Edition)

Ill. Rev. Stat., ch. 14, pars. 5(3), (4) and (12)
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Ill. Rev. Stat., ch. 120, par. 675
Ill. Rev. Stat., ch. 120, par. 697
Ill. Rev. Stat., ch. 120, par. 711
Ill. Rev. Stat., ch. 120, par. 713
Ill. Rev. Stat., ch. 120, par. 716
Ill. Rev. Stat., ch. 120, par. 751

* See the Appendix to this Petition for the full text of the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

This case involves the 1980 real estate tax on petitioners' (hereinafter the "taxpayers") property. Illinois real estate taxes, when billed, are only a lien on the property. Ill. Rev. Stat., ch. 120, par. 697. Taxpayers have alleged a lack of due process in the statutorily mandated judicial proceeding to determine the validity of the amount of any existing 1980 tax lien. (See *People ex rel. Brenza v. Anderson*, 411 Ill. 252, 254-259 (1952) for a concise and cogent explanation of this state judicial proceeding. Neither the district court nor the circuit court comprehended the nature of the state judicial proceeding. Because of this failure to understand the state judicial proceeding, the opinions below never come to grips with the issues in this case.)

Taxpayers allege they were misled by the taxing officials as to the vehicle whereby necessary access to the courts for a meaningful hearing on the merits of the assessment could be obtained.

This case involves a statutorily authorized method to access the court concerning an admitted assessment error by the assessor—an objection by certificate of error. Ill. Rev. Stat., ch. 120, par. 604. As the circuit court found, this statutory remedy, which by customary procedure of the taxing officials does not require full payment of the tax under protest, is an "alternate" method to defend against the collector's suit to adjudicate the tax lien. The other statutory remedy, the "taxpayer's objection," requires payment in full and under protest prior to the raising of any such defense. Ill. Rev. Stat., ch. 120, pars. 675 and 716.

The specific facts of this case follow:

For 1980, the assessor placed an assessment of $123,272 on taxpayers' property. Taxpayers exhausted their administrative remedy by appealing the assessment to the board of (tax) appeals. That board refused to reduce the assessment. Thus, that assessment was used to calculate the tax bill and the tax became a lien on the property. Ill. Rev. Stat., ch. 120, par. 697.

Taxpayers returned to the assessor and sought a certificate of error. Ill. Rev. Stat., ch. 120, par. 604. A certificate of error is executed by the assessor when he discovers an error in his assessment prior to a final judgment being entered in the suit to adjudicate the tax lien. *Ibid.* The certificate may be filed by the assessor as an objection to judgment being entered against the property in the suit to adjudicate the tax lien. *Ibid.*

Taxpayers were told by the assessor that he erred in making their 1980 assessment and their tax should have been based upon an assessment of $99,000—not $123,272. His staff executed the certificate of error and recalculated the 1980 tax bill.

Taxpayers were also told—in the official, written explanation of certificates of error distributed by the assessor (Appendix to this Petition, p. 19-20)—that they needed to pay only the reduced amount of taxes, the certificate would be a recommendation to the court and further notices from the collector of taxes could safely be disregarded.

Taxpayers, believing access to the court for a "full hearing" and "judicial determination" of the validity of the amount of tax lien would be afforded, followed the assessor's official, written information. They paid the reduced amount of tax.

Each year the collector files a suit to determine the validity of the tax lien shown on his tax roll—the collector's application for judgment. *Brenza, supra*, 411 Ill., at 254-255. In this mass, multiple joinder action he lists as the defendants all properties where the taxes have either been paid under protest or remain delinquent. Ill. Rev. Stat., ch. 120, par. 713. His detailed list filed with the court is his complaint and the collector must demonstrate to the court that it has jurisdiction over the property in this *in rem* action. *Brenza, supra*, 411 Ill., at 255. Jurisdiction is acquired by publication and mailed written notice to the last assessee, who is presumed to be the owner. Ill. Rev. Stat., ch. 120, par. 711.

The written "notice" mailed to those taxpayers who had not paid their 1980 taxes in full because the assessor had executed a certificate of error (Appendix to this Petition, p. 21-22) noted the certificate had been executed. It further stated the certificate would protect the property from a tax sale, promised a "judicial determination" of the certificate and told taxpayers they would be informed of the "status" of their liability after the judicial determination of the certificate.

Taxpayers, having been told by the assessor in his official, written explanation of the certificate they could safely disregard this type of notice, disregarded it.

The collector bears the initial burden of proving a *prima facie* case for judgment in the application. *Brenza, supra*, 411 Ill., at 255. His evidence is his list. *Ibid.* The verified listing of the amount of tax in the collector's pleading (the fact proved) raises the rebuttable presumption in Illinois law that the assessment is correct. *Brenza, supra*, 411 Ill., at 255, 262; *Application of Rosewell (United States Steel Corp., Objector)*, 106 Ill.2d 311, 318-319 (1985).

Taxpayers' property was listed in the collector's complaint for 1980 taxes and the assessor filed taxpayers' certificate of error as a defense or objection to the suit. Pursuant to the established policy of the court and the taxing officials that the tax need not be paid in full or under protest where an objection by certificate of error is filed, no judgment or order of sale was entered. The case, having been brought to issue, awaited the judicial hearing on the defense. The wait took over two years.

After two years, the assessor forwarded taxpayers' certificate to the board of appeals for its endorsement. Endorsement by the two commissioners of the board need be sought only where the taxpayer exhausted its administrative remedy by appealing the assessment to the board. Ill. Rev. Stat., ch. 120, par. 604. One of the commissioners refused to endorse taxpayers' certificate. Thus, the certificate became statutorily inadmissible as evidence of the assessor's admitted error. *Ibid.*

The certificate was shortly thereafter presented to the court by the state's attorney. (By statute, the state's attorney was then representing parties on both sides of the case. He was representing the plaintiff, the collector, and taxpayers' defender, the assessor. Ill. Rev. Stat., ch. 14, pars. 5(3), (4) and (12).) The certificate being unendorsed, the objection was denied and judgment was entered against taxpayers' property for the full amount of tax and all accumulated penalties.

No hearing on the merits of the tax or the assessor's admitted error was conducted. Judgment was entered solely pursuant to the mandatory, rebuttable presumption that the assessment, though admittedly incorrect, was correct. Thus, the apparent uncontested action on the assessor's error was converted to an actual uncontested action on the correctness of the assessment.

Taxpayers' surrogate defender, the assessor, did not appeal and no one notified taxpayers of any of the foregoing proceedings until the judgment and order of sale was final. By statute a final judgment ordering a sale in an application is by itself conclusive and preclusive evidence of the correct amount of tax, lack of relevant defenses and the regularity and validity of the court proceeding. Ill. Rev. Stat., ch. 120, par. 751.

Upon learning of the entry of the final judgment, taxpayers attempted to pay the tax and all accumulated penalties under protest—the tax now having been found to be due. The protest was rejected as untimely and, to protect the property from the threatened sale, taxpayers paid the tax and all accumulated penalties.

Having absolutely no Illinois judicial remedy (See *Chicago Sheraton Corp. v. Zaban*, 71 Ill.2d 85, 92 (1978); Ill. Rev. Stat., ch. 120, par. 751), taxpayers filed this action in federal district court. They sought a declaratory judgment and damages pursuant to 42 U.S.C. §1983. They alleged the district court had jurisdiction to enter a declaratory judgment pursuant to 28 U.S.C. §2201 and had jurisdiction to hear an action for damages pursuant to 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1343(a)(4) (civil rights).

The district court dismissed the action upon a threshold determination that the doctrine of comity barred relief by damages or a declaratory judgment. The circuit court affirmed the dismissal of the amended complaint.

While the circuit court opinion states the dismissal was "for failure to state a claim upon which relief could be granted," the circuit court also found that comity barred taxpayers' claims. A dismissal for failure to state a claim would make the claims *res judicata* if refiled in state

court. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980). A dismissal for lack of subject matter jurisdiction would not. *Smith v. Neal*, 109 U.S. 426, 430 (1883). The wording of the circuit court opinion could preclude taxpayers from filing an action pursuant to 42 U.S.C. §1983 in state court based upon the claims here presented.

For this reason, this petition presents a question concerning the limits of comity as a bar to federal court jurisdiction and a question concerning the merits of the action. It should soon become clear to this Court that these two questions are inextricably intertwined due to the nature of the protected right—access to the courts.

ARGUMENT

I.

THE EXCLUSIVE STATE FORUM FOR DETERMINING THE CORRECT AMOUNT OF TAX LIEN—THE COURT

Once assessments are certified by the assessing officials as correct, they are used to calculate the tax. The tax is a lien on the property. Ill. Rev. Stat., ch. 120, par. 697.

In Cook County, Illinois, there is only one forum in which the lien may be altered. That forum is the court and the exclusive vehicle is the collector's application*—his suit against the property to adjudicate the tax lien.

* All parties concede that equitable jurisdiction in state court does not exist to correct an assessor's admitted error. See *First National Bank of Evanston v. Rosewell*, 93 Ill.2d 388, 390-392 (1982), *reversing* 101 Ill.App.3d 459 (1981).

The taxing officials and the taxpayer cannot, by their mere agreement, reduce the amount of the tax lien. Only the court may do that. Thus, even where a certificate of error is admissible evidence of the assessor's error, the court may deny the objection as a matter of its discretion and enter judgment for the full amount of tax. *Application of the County Treasurer (Wahrer, Objector)*, 109 Ill.App.3d 440, 444-445 (1982), petition for leave to appeal denied, 92 Ill.2d 579 (1983).

Illinois, through its courts, monopolizes the mechanism for dispute resolution in real estate tax matters and, therefore, access to the court system is necessary. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430 (1982); *Boddie v. Connecticut*, 401 U.S. 371, 376-377 (1971).

In *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), this Court inadvertently characterized tax objections as "in effect a reverse suit for a refund." *Ibid.*, at 508. Objections are really no such thing. They are defenses to a suit in which the collector files the complaint and in which he must establish that the court has jurisdiction over the property. *Brenza, supra*, 411 Ill., at 255; *Rosewell v. Chicago Title and Trust Co.*, 99 Ill.2d 407, 410-411 (1984). The collector has the initial burden of proof, *Brenza, supra*, 411 Ill., at 255. Where objections are filed, the court must hear the case. *Ibid.*, at 256.

In *Rosewell* this Court assumed that the collector establishes jurisdiction, assumed a full or fair judicial determination and assumed no unreasonable burdens on access to the court. This case involves challenges to all those assumptions. The opinion of the circuit court found *Rosewell* controlling and sidestepped the constitutional issues raised herein by relegating them to a footnote in the opinion.

II.

AVAILABILITY OF THE "ADEQUATE REMEDY"

When the assessor confessed an error in the assessment to taxpayers, there was no forum in which the taxpayers could adjudicate or reduce the tax lien. They had no remedy they could invoke. They could not file their own suit. They had to wait for the collector to sue them by filing his application.

In the meantime, the assessor told them in his official, written explanation of the certificate, they "needed to pay only the reduced amount" of tax, they could "disregard" notices from the collector concerning the deficiency and the certificate would be a "recommendation" to the court. Taxpayers believed the assessor's official, written information and followed it.

The opinion of the circuit court finds that a taxpayer's objection was the "adequate remedy" available to these taxpayers which implicates the doctrine of comity. However, the ability to file their own defense to the collector's suit was *never* available to these taxpayers at any time during the pendency of the suit precisely because they followed the assessor's information and did not pay the tax in full and under protest.

This Court has held, in construing the Tax Injunction Act (28 U.S.C. §1341) that if the taxpayer's remedy is a "defense to a suit brought by (the taxing officials) to recover taxes, this is hardly a remedy that could be invoked by (the taxpayer)." *Georgia R. Co. v. Redwine*, 342 U.S. 299, 303, note 11 (1952).

Moreover, under Illinois law, taxpayers could not file a taxpayer's objection independently of or concurrently with the statutory remedy they chose to access the court—the objection by certificate. A taxpayer objection requires,

as a pre-condition, timely full payment of the tax under protest—even where a certificate of error is filed as an objection. *Wahrer, supra*, 109 Ill.App.3d, at 443.

Finally, under the standards set forth in *Rosewell*, the "adequate remedy" was not "plain" given the official, written misinformation of the assessor and the collector; was not "efficient" because it involved filing a duplicate defense to the suit; and, was not "speedy" since it required payment of a tax the assessor and collector felt was not due, but which could only be refunded two years later without interest. *Rosewell, supra*, 450 U.S., at 516-521. *Rosewell* does not require dismissal of taxpayers' claims.

III.

PROCEDURAL DUE PROCESS– NOTICE OF SUIT

The taxing officials have consistently argued the judicial "hearing" on the certificate involves only the assessor and the collector and does not implicate taxpayers or their property. They consider taxpayers a "stranger" to the court proceeding. As a matter of substantive federal constitutional law, taxpayers are not "strangers" who lack standing to challenge the state court proceeding. See *Valley Forge College v. Americans United*, 454 U.S. 464, 471-476 (1982); *Souffrant v. Compagnie des Sucreries*, 217 U.S. 475, 486-487 (1910). The following argument is presented on the assumption the taxing officials are correct—that taxpayers were "strangers" to the court proceeding on the certificate of error.

The collector must establish jurisdiction over taxpayers or their property in his tax foreclosure proceeding—the application. *Brenza, supra*, 411 Ill., at 255; *Smith v. D.R.G., Inc.*, 63 Ill.2d 31, 33 (1976).

Due process requires meaningful notice of the filing of such a proceeding so that objections can be raised. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795 (1983).

Taxpayers argued that the mailed, written notice by the collector of the commencement of the application, either by itself or especially when coupled with the assessor's official, written assurance that notices from the collector could safely be disregarded, is misleading and the entry of a final judgment in the suit deprived taxpayers of due process of law.

The opinion of the circuit court, without any explanation, finds *Mennonite* inapplicable. Taxpayers ask: If the only parties to the objection by certificate of error are the collector and the assessor, why is *Mennonite* inapplicable? How did the state court acquire jurisdiction over taxpayers or their property?

Misleading notice cannot be adequate notice. The notice given to taxpayers cannot pass muster under the constitutional requirements of the content and timing of the notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-315 (1950); *Goss v. Lopez*, 419 U.S. 565, 579-580 (1975). See, further, Restatement, Second, Judgments, §2 and Comments b, d and f.

IV.

PROCEDURAL DUE PROCESS— HEARING IN THE SUIT

Obviously, these taxpayers thought the assessor's filing the certificate of error as a defense to the collector's suit would cause a "full hearing" and "judicial determination" concerning the merits of the tax as required by *Rosewell, supra*, 450 U.S., at 514; *Fair Assessment in*

Real Estate v. McNary, 454 U.S. 100, 112 (1982); and, *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982).

How naively negligent of them! They should have foreseen the constitutionally deficient hearing that was held.

Taxpayers were told in the assessor's official, written explanation of the certificate that it would be a "recommendation" to the court. Recommendations by a public official to a court whose functions include determining whether that official made an error would presumably be entitled to some weight in the proceeding. Such was not the case for this certificate of error.

The administrative non-endorsement of the certificate made it inadmissible. Thus, there was no "judicial determination" of the certificate. There was only an administrative determination by the board of appeals.

The obvious purpose of the application is to determine a taxpayer's liability by determining the validity of the tax lien on its property. This Court has held, concerning hearings the purpose of which is to determine liability, "procedural due process will be satisfied by an inquiry limited to the determination of whether there is a reasonable possibility of judgments in the amounts claimed being rendered." *Bell v. Burson*, 402 U.S. 535, 540 (1971). Where liability is an important factor in the state scheme, "the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing." *Ibid.*, at 541.

In the proceeding complained of in state court to determine liability, the collector's application, there was no inquiry into the merits of the tax or the assessor's admitted error. Evidence of the error was statutorily inadmissible. Ill. Rev. Stat., ch. 120, par. 604. The entry of judgment

for the full amount of tax was based *solely* on the presumption the assessment was correct. *Brenza*, *supra*, 411 Ill., at 255, 262; *United States Steel*, *supra*, 106 Ill.2d, at 318-319, despite the fact that taxpayers' surrogate defender, the assessor, filed a defensive pleading, the objection by certificate, in which he admitted he made a mistake.

However, that presumption, as applied to the facts that existed, violated taxpayers' right to due process of law because there was no rational basis or logical connection between the fact proved (the amount of tax listed in the collector's delinquent list) and the fact presumed (the assessor was correct in his initial assessment). *Tot v. United States*, 319 U.S. 463, 467-468 (1943); *Stanley v. Illinois*, 405 U.S. 645, 652-658 (1972). Moreover, given the risk of error inherent in the irrational presumption, the collector's burden of proof in the application for the class of cases where the assessor confesses error and files an objection does not meet minimum due process requirements. *Santosky v. Kramer*, 455 U.S. 745, 761-765 (1982).

The decisions of the circuit court and the district court make no comment on the ostrich-like action in the state judicial proceeding. Despite the assessor's confessed error, the state court saw, heard and spoke no evil concerning the assessment.

V.

"SUBSTANTIVE" DUE PROCESS— ACCESS TO THE COURTS

This Court has previously been asked to declare the administrative aspects of the Cook County certificate of error procedure unconstitutional. *Chicago Sheraton Corp.*

v. Zaban, 71 Ill.2d 85 (1978), appeal dismissed for want of a substantial federal question, 439 U.S. 888 (1978) (two Justices would have noted probable jurisdiction).

The circuit court felt bound by this Court's decision in *Chicago Sheraton* when it considered taxpayers' claims. (It also felt bound by *Chicago Sheraton* when that taxpayer's companion federal case was heard by it. See *Chicago Sheraton Corp. v. Zaban*, 593 F.2d 808, 809, and concurrence of Bauer, J., at 810-811 (7th Cir. 1979).)

Taxpayers believe this Court's dismissal of the appeal in *Chicago Sheraton* is not binding concerning their claims for two reasons. First, the taxpayer in *Chicago Sheraton* never exhausted its administrative remedy by appealing the original assessment to the board of appeals. These taxpayers did.

Second, the taxpayer in *Chicago Sheraton* only claimed a right to due process in the administrative hearing by the board of appeals on the certificate when the board's endorsement was sought. See *Chicago Sheraton*, *supra*, 71 Ill.2d, at 89. These taxpayers raise a far broader, more substantive and different claim. While a taxpayer might have no "standing" to complain of a deprivation in the administrative hearing on the certificate, it surely has standing to claim it was denied due process in the lawsuit filed against its property.

Taxpayers claim denial of a right entitled to "substantive" due process protection—access to the courts. This Court has held the right of access to the courts stems not only from the Due Process Clauses, *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *Logan*, *supra*, 455 U.S., at 420-430, but also from the Right to Petition Clause of the First Amendment, *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510, 513 (1971), and the

Privileges and Immunities Clause of Article IV, section 2 of the United States Constitution. *Chambers v. Baltimore and Ohio Railroad*, 207 U.S. 142, 148 (1907). This Court has further held that access to the courts must be adequate, meaningful and effective. *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

Taxpayers argued that since their property is the defendant in the state proceeding, access was necessary. (See Point I, *supra*.) They also argued that access to the court in the application is an entitlement under Illinois law. Ill. Rev. Stat., ch. 120, par. 716 allows "any person interested in" the property the right to raise defenses to the collector's suit.

Access to the courts of necessity or by entitlement is protected by the Due Process Clauses. *Logan*, *supra*, 455 U.S., at 429-430. As this Court stated in *Logan*:

> "(H)aving made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." *Ibid.*, at 430, note 5; and
>
> "To put it as plainly as possible, the State may not finally destroy a property interest without giving the putative owner an opportunity to present a claim of entitlement." *Ibid.*, at 434.

These taxpayers argued their protected necessary right of access was unconstitutionally terminated by following the official, written misinformation given to them by the assessor and collector citing *Logan*. Taxpayers further cited *Cleveland Board of Education v. Loudermill*, ____ U.S. ____ , 105 S.Ct. 1487, 1491-1493 (1985) for the proposition that the adequacy of the procedures whereby the taking is accomplished is a matter of substantive federal constitutional law. The answer to the question whether due

process is afforded is not found in the state statutes. *Ibid.*, at 1493. The inquiry does not end with a recitation of the state procedure for terminating the protected interest (i.e., payment in full under protest).

Yet, that is all the opinion of the circuit court does. It looks at the state statutes, recites the procedures and summarily concludes there was no lack of meaningful notice or meaningful opportunity to be heard.

The opinion then declares, without any explanation, that *Logan* and *Loudermill* are inapplicable. Taxpayers ask: "Why are these recent opinions of this Court inapplicable to a claim of unconstitutional denial of necessary access to the courts?"

What state interest outweighs taxpayers' private interest, the obvious risk of an erroneous determination and the declared state interest in fair taxation (Illinois Constitution, Article IX, section 4(a)) so that no consideration of the proper tax liability need be had in the proceeding to determine that proper tax liability when the assessor confesses error? Surely, the argument that taxes are the lifeblood of local government has its limitations.

VI.

COMITY—IS THERE A STATE COURT JUDICIAL REMEDY FOR THE UNCONSTITUTIONAL DEPRIVATION ALLEGED HEREIN

Taxpayers believe this Court's "real" holding in *Rosewell* is that Illinois grants necessary access to its courts by entitlement. *Rosewell, supra*, 450 U.S., at 514. It is that entitlement to necessary access for taxpayers and their surrogate defender which they claim has been taken

without due process. Thus, the entitlement itself cannot be an adequate remedy for its own unconstitutional taking.*

No one (the taxing officials, the circuit court or the district court) has pointed to any remedy other than the unavailable defense of a taxpayer's objection as the "adequate remedy" for the alleged unconstitutional deprivation. In *Chicago Sheraton*, the Supreme Court of Illinois categorically stated:

> "(P)laintiff (taxpayer) had neither a statutory or a constitutional right to participate in the certificate of error proceeding or to challenge any alleged irregularities in that proceeding." 71 Ill.2d, at 92.

State law makes the judgment entered conclusive and preclusive as to the amount of tax, lack of all relevant defenses and the regularity and validity of the court proceeding. Ill. Rev. Stat., ch. 120, par. 751.

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* The opinion of the circuit court boldly asserts that taxpayers knew all along what they were doing. It states: "In paragraph 21 of their amended complaint, plaintiffs acknowledge that they understood this procedure. Nothing prevented them from pursuing this remedy (a taxpayer objection)." 771 F.2d, at 1091. Paragraph 21 of the amended complaint states:

> "21. In reliance upon the recalculation, acceptance of partial payment and marking of the tax records, plaintiffs did not pay the second installment of 1980 real estate taxes in full or under protest and filed no objection when the collector filed his suit (application) to adjudicate protested taxes and to enter judgment and order a sale where the taxes remain unpaid."

Non-compliance with the statutory procedure is acknowledged in Paragraph 21. Understanding of the procedure contemporaneous with the non-compliance is not. The official, written misinformation of the assessor prevented taxpayers from pursuing their own taxpayer's objection.

Moreover, the presumption of understanding applied by the circuit court deprived taxpayers of a hearing on a question of fact. The presumption is incompatible with the proper standard of review where a complaint is dismissed.

Here the remedy for the deprivation is not merely speculative or uncertain. *Hillsborough v. Cromwell*, 326 U.S. 620, 622-623 (1946). No remedy exists. (Taxpayers asked the circuit court to certify a question to the Supreme Court of Illinois concerning any remedy which might now be available in state court. The circuit court refused to certify the question.) Comity does not require dismissal of this action.

CONCLUSION

The decision of the circuit court is clearly wrong. That court never understood the nature of the state court proceeding. Its decision must be reversed.

Each year the Assessor of Cook County executes tens of thousands of certificates of error. (He annually makes over 3 million assessments.) The record before the circuit court contains undisputed evidence that over 20,000 certificates of error were filed as objections to the collector's application concerning 1980 taxes. In contrast and as a direct result of the willingness of the assessor to admit it when he made an error, only 1,465 taxpayer's objections were filed as defenses to the collector's 1980 application. Thus, the "remedy" by certificate of error is "the" remedy in Cook County. It is the remedy preferred by the taxing officials themselves because, in most cases, it provides a politically advantageous method, under the watch of the court, to prevent taxpayer dissatisfaction from clogging the courts with highly contested lawsuits where the taxpayer must first pay all the tax.

This Court needs to settle the questions raised herein and clear the air. Because this Court refused to consider the appeal in *Chicago Sheraton* and has recently issued *Rosewell*, all inferior courts have deferred to this Court. Only this Court can now ensure that the statutorily authorized remedy of objection by certificate of error will provide meaningful access to the Illinois courts for taxpayers or their surrogate defender for the "full hearing" and "judicial determination" of the proper amount of the tax required by *Rosewell*, *Fair Assessment* and *Grace Brethren Church*.

This petition should be granted.

Respectfully submitted,

JAMES A. ROONEY
134 North LaSalle Street
Suite 720
Chicago, Illinois 60602
(312) 332-2600
Attorney for Petitioners

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2977

ZELLMER FROMM and MARILYN TUCKER, individually and on behalf of all those similarly situated,

Plaintiffs-Appellants,

vs.

EDWARD J. ROSEWELL, Treasurer and Ex Officio County Collector of Cook County, Illinois; THOMAS C. HYNES, Assessor of Cook County, Illinois; HARRY H. SEMROW and PATRICK QUINN, Commissioner of Board of (Tax) Appeals of Cook County, Illinois; RICHARD M. DALEY, State's Attorney of Cook County, Illinois; the COUNTY OF COOK, a body corporate and politic; and ROBERT J. DEMPSEY, Judge of the Circuit Court of Cook County, Illinois,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 84 C 4781—**Frank J. McGarr**, *Chief Judge*

ARGUED AND SUBMITTED JUNE 5, 1985

Before: COFFEY, FLAUM, and WRIGHT*, *Circuit Judges.*

WRIGHT, *Circuit Judge.* Property owners in Cook County, Illinois sued under 42 U.S.C. § 1983 for alleged depri-

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* Hon. Eugene A. Wright, Senior Circuit Judge, for the Ninth Circuit.

vations of procedural due process rights by county officials who determined plaintiffs' liability for 1980 real estate taxes. They sought a declaratory judgment, damages, and injunctive relief. The district court dismissed their complaint for failure to state a claim upon which relief could be granted. We affirm the dismissal.

FACTS AND STATUTORY FRAMEWORK

Under Illinois law, there are two procedures for challenging Cook County tax assessments: (1) the "taxpayer objection" procedure, and (2) the "certificate of error" procedure.

Under the first, plaintiffs may challenge their assessments by filing a complaint with the Board of Appeals (Board). Ill. Rev. Stat. ch. 120, § 598. The Board's two commissioners have four-year terms. *Id.* at § 492. Their function is to review taxpayer complaints. *See generally People ex rel. Thomas v. Nixon*, 353 Ill. 556, 187 N.E. 650 (1933) (tracing legislative history of the Cook County Board of Appeals).

The taxpayer is entitled to notice of the Board's hearing and an opportunity to be heard. Ill. Rev. Stat. ch. 120, § 599. Judicial review of the Board's actions is available in the state courts but the taxpayer must first pay the entire tax under protest. *Id.* at § 675. Then he must file objections to the collector's Application for Judgment and order of sale attacking the assessment. *Id.* at 716. The plaintiff may raise constitutional challenges to the assessment in his objection. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514 (1981).

The "certificate of error" procedure provides an alternate method of challenging taxes. *See Chicago Sheraton Corp. v. Zaban*, 71 Ill. 2d 85, 373 N.E.2d 1318, 1321, *appeal dismissed*, 439 U.S. 888 (1978). This procedure provides:

> In counties containing 1,000,000 or more inhabitants, if, at any time before judgment is rendered in any proceeding to collect or to enjoin the collection of taxes based upon any assessment of any property

> belonging to any person or corporation, the county assessor shall discover an error or mistake in such assessment, such assessor shall execute a certificate setting forth the nature of such error, and the cause or causes which operated to produce it. The certificate when endorsed by the board of appeals showing its consurrence therein, and not otherwise, may be received in evidence in any court of competent jurisdiction, and when so introduced in evidence such certificate shall become a part of the court records, and shall not be removed from the files except upon the order of the court.
>
> A certificate executed pursuant to this Section may be issued to the person erroneously assessed or may be presented by the assessor to the court as an objection in the application for judgment and order of sale for the year in relation to which the certificate is made.

Ill. Rev. Stat. ch. 120, § 604.

Fromm and Tucker first challenged their 1980 assessment by filing a complaint with the Board alleging the assessed value of their property was too high. The Board refused to lower the assessment.

Tax collector Rosewell issued 1980 tax bills of $21,043.98 based on the assessed value of $123,272. Plaintiffs paid the first installment in full.

Upon receiving the second installment bill, they asked tax assessor Hynes to execute a certificate of error. Hynes reduced the assessment to $99,000 and recalculated their tax bill. He informed plaintiffs that they needed to pay only the reduced amount and could disregard notices advising them of the unpaid balance "until the matter is resolved in court." He also told them, however, that the certificate of error did not assure a favorable determination and was only a recommendation to the Circuit Court.

At this point, they could have followed the tax objection procedure by paying the full amount of the original second bill under protest, thus preserving their right to contest the assessment in court. Instead, they paid only

the reduced amount in reliance upon the certificate of error.

After two years, Hynes forwarded the executed certificate to the defendant Commissioners Semrow and Quinn for their endorsements. Quinn refused to endorse the certificate. Appellants received no notice of his refusal.

Because plaintiffs had not paid their initial 1980 assessment in full, the collector proceeded to file an Application for Judgment and order of sale with the Circuit Court. Plaintiffs were not entitled to file any objections to the collector's action because they had not paid the full amount of taxes under protest, a necessary prerequisite. Ill. Rev. Stat. ch. 120, § 716.

In February 1984, State's Attorney Daley presented the non-endorsed certificate of error to defendant Circuit Court Judge Dempsey as an objection, pursuant to Ill. Rev. Stat. ch. 120, § 604.

Judge Dempsey refused to admit the certificate into evidence because it had not been endorsed by the Board. *See id.* Because there were no valid objections to the collector's Application for Judgment, he entered judgment against the property for the unpaid taxes plus interest. The judgment was not appealed.

In April 1984, defendant Rosewell mailed the judgment order to plaintiffs. Their attempt to pay the assessed taxes under protest were denied.

They then paid their delinquent 1980 taxes, plus full interest and penalties in the amount of $6,133.76, and regained title to the property.

PROCEEDINGS BELOW

They brought this Section 1983 action for alleged deprivations of their money and their statutory right to contest their assessment. They complained that they did not receive notice of the Board's refusal to endorse their certificate, were denied an opportunity to present evidence

to the Board, and were not notified of the proceeding before Judge Dempsey.

The district court granted defendants' motion to dismiss. The court held that injunctive relief is barred by the Tax Injunction Act (Act), 28 U.S.C. § 1341, and declaratory and monetary relief is barred by comity.

Appellants have dismissed their appeal from the denial of injunctive relief and challenge only the dismissal of the declaratory judgment and damages claims. In the alternative, they ask this court to certify the question of availability of state remedies to the Illinois Supreme Court.

STANDARD OF REVIEW

Review of a dismissal for failure to state a claim is limited to the contents of the complaint. We accept its factual allegations as true. *Strauss v. City of Chicago*, 760 F.2d 765, 766 (7th Cir. 1985). The complaint should not be dismissed unless it appears beyond doubt that plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Carl Sandburg Village Condominium Ass'n v. First Condominium Development Co.*, 758 F.2d 203, 207 (7th Cir. 1985).

ANALYSIS

The Tax Injunction Act bars a taxpayer from contesting the validity of a state tax in a § 1983 injunction action if there is a "plain, speedy and efficient" state remedy available. *Rosewell*, 450 U.S. at 512. It divests the court of jurisdiction to consider actions that "suspend or restrain" the assessment and collection of state taxes. *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982).

Principles of comity bar a taxpayer from contesting the validity of a state tax in a § 1983 damage or declaratory judgment action if there is a "plain, adequate and complete" state remedy available. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981); *Great*

Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943); *Alcan Aluminum Ltd. v. Dept. of Revenue of the State of Oregon*, 724 F.2d 1294, 1297 (7th Cir. 1984).

We agree with the district court that the comity principle controls the disposition of appellants' claims for declaratory relief and money damages. These taxpayers must seek protection of their federal rights by state remedies, the adequacy of which is well settled. *See Fair Assessment*, 454 U.S. at 116.

In *Rosewell v. LaSalle National Bank*, an Illinois taxpayer challenged the constitutionality of the taxpayer objection procedure on equal protection and due process grounds. The Supreme Court held that the procedure is a plain, speedy and efficient remedy against a wrongful assessment. 450 U.S. at 514. The Court reasoned:

> There is no doubt that the Illinois state-court refund procedure provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax . . . Appeal to higher Illinois courts is authorized, . . . and review is ultimately available in this Court . . .

Id. (citations omitted).

In paragraph 21 of their amended complaint, plaintiffs acknowledged that they understood this procedure. Nothing prevented them from pursuing this remedy.

Regarding the certificate of error procedure, the Illinois Supreme Court has made clear that taxpayers have neither a statutory nor a constitutional right to participate in the certificate of error proceeding or to challenge any alleged irregularities in it. *Chicago Sheraton Corp. v. Zaban*, 373 N.E.2d at 1321. We held that the U.S. Supreme Court's dismissal for want of a substantial federal question operated as an adjudication on the merits of the constitutional claim presented. *Chicago Sheraton Corp. v. Zaban*, 593 F.2d 808 (7th Cir. 1979). We explained:

> We have examined the jurisdictional statement in the appeal to the Supreme Court, the opinion of the Illi-

> nois Supreme Court, and the briefs filed by parties before that court and conclude that the precise constitutional claim of deprivation of due process as presented here was presented and decided by the Illinois Supreme Court and by summary dismissal of the appeal in the United States Supreme Court.

Id. at 809.

The *Zaban* case bears a strong resemblance to this case. In *Zaban*, the plaintiff's property was the subject of an assessor's certificate of error forwarded to the Board. After a four-year delay, the Board refused to endorse the certificate. The plaintiff had no notice of the nonendorsement. The state court refused to consider the non-endorsed certificate.

There, as here, the plaintiff failed to pursue its available remedy, the taxpayer objection procedure codified at Ill. Rev. Stat. ch. 120, §§ 675 and 716. The Illinois Supreme Court held that "[h]aving failed to timely file a complaint with the board, plaintiff was precluded from pursuing the statutory remedy of objection in the collector's application for judgment proceeding." *Zaban*, 373 N.E.2d at 1322.

The flaw in appellants' argument is that the certificate of error procedure is not the statutory method to judicially challenge tax assessments in Illinois. The taxpayer objection procedure may be pursued independently of and concurrently with the remedy they chose. *Rosewell*, 450 U.S. at 514. The two remedies are not mutually exclusive.

Appellants have a constitutionally adequate state remedy to protest the assessment and collection of property taxes. They may not claim a deprivation of due process rights because the tax objection procedure was available to them.[1]

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[1] We reject appellants' claim of denial of court access based on *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487 (1985), *Mennonite Board of Missions v. Adams*, 103 S. Ct. 2706 (1983), and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). We find these cases inapplicable.

Because this case is controlled by the precedent cited, we deny the motion to certify. *See* Ill. Rev. Stat. ch. 110A, § 20 (certification discretionary where state law issue may be determinative and there are no controlling precedents in the decisions of the state supreme court); 7th Cir. R. 13 (this court may certify question of state law when rules of the highest court of a state permit certification).

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ZELLMER FROMM and MARILYN TUCKER, individually and on behalf of all those similarly situated,

Plaintiffs,

No. 84 C 4781 v.

EDWARD J. ROSEWELL, Treasurer and Ex-Officio County Collector of Cook County, Illinois; THOMAS C. HYNES, Assessor of Cook County, Illinois; HARRY H. SEMROW and PATRICK QUINN, Commissioners of the Board of (Tax) Appeals of Cook County, Illinois; RICHARD M. DALEY, State's Attorney of Cook County, Illinois; the COUNTY OF COOK, a body politic and corporate; and ROBERT J. DEMPSEY, Judge of the Circuit Court of Cook County, Illinois,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs Zellmer Fromm and Marilyn Tucker ("plaintiffs") bring this action against defendants Edward J. Rosewell, Treasurer and ex-officio County Collector of Cook County, Thomas C. Hynes, Assessor of Cook County ("Hynes"), Harry Semrow and Patrick Quinn, Commissioners of the board of appeals of Cook County ("Semrow" and "Quinn"), Richard Daley, State's Attorney of Cook County, Robert Dempsey, Judge of the Circuit Court of Cook County ("Judge Dempsey"), and the County of Cook. Plaintiffs allege that they have been deprived of property interests without due process of law by the actions and policies of the defendants concerning plaintiffs' liability for certain 1980 real estate taxes. This cause is before this court on the defendants' motions to dismiss.

An understanding of the statutory scheme by which a taxpayer may contest the assessment of his real estate in Cook County is necessary to the resolution of this dispute. A taxpayer who feels his property is overassessed may file a written complaint with the board of appeals ("board"). Ill. Rev. Stat. ch. 120, ¶ 598. The party affected by the complaint is entitled to notice of the board's hearing and an opportunity to be heard. Ill. Rev. Stat. ch. 120, ¶ 599. If the taxpayer wishes to object in a judicial proceeding to the tax to be paid, he must pay the tax in full and under protest. Ill. Rev. Stat. ch. 120, ¶¶ 675, 716.

The statutory scheme also provides a procedure for the assessor to correct a mistake which he might have made, by filing a certificate of error with the board. Ill. Rev. Stat. ch. 120, ¶ 603. The Illinois Supreme Court has described the certificate of error process as an "expeditious summary procedure, without participation by the taxpayer, for correcting the assessor's errors." *Chicago Sheraton Corp. v. Zaban*, 71 Ill. 2d 85, 91, 373 N.E.2d 1318, 1321, 15 Ill. Dec. 634, 637 (1978). If the certificate is endorsed by the board, it may be presented as an objection in the application for judgment and order of sale for the year in relation to which the certificate was made. Ill. Rev. Stat. ch. 120, ¶ 604.

Plaintiffs allege that the assessment for their property for 1980 was $123,272. Plaintiffs filed a complaint with the board, but the board refused to reduce the assessment. Plaintiffs paid the first installment for their 1980 tax in full. Upon receiving the second installment bill, they requested Hynes to execute a certificate of error. Hynes executed a certificate and plaintiffs paid a reduced amount for the second installment based upon the certificate. Two years later the certificate was forwarded to Semrow and Quinn for their endorsement. Quinn did not endorse the certificate. Consequently, Judge Dempsey would not receive the nonendorsed certificate into evidence when offered by the state's attorney at the application for judgment and order of sale. As a result, plaintiffs were forced

to pay the difference between the reduced amount they had paid for the second installment for their 1980 tax and the original full amount, plus interest. Plaintiffs complain that they did not receive notice of the board's refusal to endorse the certificate, were denied an opportunity to present evidence to the board in support of the certificate, and were not notified of the date of presentation of the certificate to Judge Dempsey, allegedly depriving plaintiffs of their statutory right to contest the amount of tax and their money without due process of law. Plaintiffs request a declaratory judgment, damages, and injunctive relief.

A district court of the United States cannot enjoin, suspend, or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the courts of such state. 28 U.S.C. § 1341. The Supreme Court has recognized that the Illinois procedure for challenging tax assessments provides the taxpayer with a "full hearing and judicial determination at which any and all constitutional objections to the tax may be raised." *Rosewell v. La Salle National Bank*, 450 U.S. 503, 514 (1980).

Plaintiffs do not contend that they were unable to argue the merits of the tax assessment at their hearing before the board. Nor do they contend that they were unable to obtain judicial review of the tax by utilizing the statutorily provided procedure. Rather, plaintiffs contend that fundamental fairness entitles them to an additional hearing before the board with respect to the certificate and an additional opportunity for obtaining judicial review.

In determining whether § 1341 proscribes this court from entering injunctive relief, the only relevant question is whether the courts of Illinois provide plaintiffs with a "plain, speedy, and efficient" remedy. Because the Supreme Court has answered this question in the affirmative, this court cannot provide injunctive relief to plaintiffs.

Considerations of comity compel this court to reach a similar conclusion with respect to plaintiffs' request for damages and declaratory relief. *See Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). These cases teach that federal courts should have "a proper reluctance to interfere . . . with the fiscal operations of the state governments . . . in all cases where the federal rights of the persons could otherwise be preserved unimpaired." *Fair Assessment*, 454 U.S. at 109, quoting, *Boise Artesian Water Co. v. Boise City*, 213 U.S. 276, 282 (1909). Taxpayers must seek protection of their federal rights by state remedies, provided those remedies are plain, adequate, and complete and the taxpayers may ultimately seek review of the state decision in the Supreme Court. *Fair Assessment*, 454 U.S. at 116. Because plaintiffs were afforded a complete and adequate opportunity to have their claims reviewed in state court, even though they chose not to take advantage of that opportunity, this court does not have jurisdiction over this matter.

For the foregoing reasons, defendants' motions to dismiss are granted.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: October 17, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ZELLMER FROMM and MARILYN TUCKER, individually and on behalf of all those similarly situated,

Plaintiffs,

No. 84 C 4781 v.

EDWARD J. ROSEWELL, Treasurer and Ex-Officio County Collector of Cook County, Illinois; THOMAS C. HYNES, Assessor of Cook County, Illinois; HARRY H. SEMROW and PATRICK QUINN, Commissioners of the Board of (Tax) Appeals of Cook County, Illinois; RICHARD M. DALEY, State's Attorney of Cook County, Illinois; the COUNTY OF COOK, a body politic and corporate; and ROBERT J. DEMPSEY, Judge of the Circuit Court of Cook County, Illinois,

Defendants.

MEMORANDUM OPINION AND ORDER

By memorandum opinion and order dated October 17, 1984 (the "opinion"), this court dismissed this action. This matter is now before the court on plaintiffs' petition for reconsideration. For the reasons contained herein, plaintiffs' petition is denied.

Plaintiffs initially seek reconsideration because of this court's apparent belief that the certificate of error filed by the assessor is governed by Ill. Rev. Stat. ch. 120, ¶ 603, as opposed to ¶ 604. This court cited ¶ 603 on page 2 of the opinion. This court's decision, however, was based on ¶ 604 and its citation of ¶ 603 was inadvertent. Consequently, line 17 of page 2 of the opinion is hereby amended to read "¶ 604" in place of "¶ 603."

Plaintiffs also contend that reconsideration is appropriate because this court merely found that "plaintiffs were afforded a complete and adequate opportunity to have their claims reviewed in state court" and did not further find that the opportunity afforded to plaintiffs to have the merits of the alleged error on their assessment judicially reviewed was "plain" and "efficient" as those terms were construed in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1980). This contention overlooks this court's finding on page 4 of the opinion that "[b]ecause the Supreme Court has answered this question [whether the courts of Illinois provide plaintiffs with a plain, speedy, and efficient remedy] in the affirmative, this court cannot provide injunctive relief to plaintiffs." In *Rosewell*, the Supreme Court held that the Illinois procedure for a property owner to preserve his right to have his assessment judicially reviewed by paying his taxes in full constitutes a plain, speedy, and efficient remedy under 28 U.S.C. § 1341.

For the foregoing reasons, plaintiffs' petition for reconsideration is denied.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: November 2, 1984

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

August 29, 1985.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. EUGENE A. WRIGHT, *Senior Circuit Judge**

ZELLMER FROMM and MARILYN TUCKER, individually and on behalf of all those similarly situated,

Plaintiffs-Appellants,

No. 84-2977 vs.

EDWARD J. ROSEWELL, Treasurer and Ex-Officio County Collector of Cook County, Illinois, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 84 C 4781
Judge Frank J. McGarr

---

* The Honorable Eugene A. Wright, Senior Circuit Judge, for the Ninth Circuit.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

October 2, 1985.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. EUGENE A. WRIGHT, *Senior Circuit Judge**

ZELLMER FROMM and MARILYN TUCKER, individually and on behalf of all those similarly situated,

Plaintiffs-Appellants,

No. 84-2977 vs.

EDWARD J. ROSEWELL, Treasurer and Ex Officio County Collector of Cook County, Illinois; THOMAS C. HYNES, Assessor of Cook County, Illinois; HARRY H. SEMROW and PATRICK QUINN, Commissioners of Board of (Tax) Appeals of Cook County, Illinois; RICHARD M. DALEY, State's Attorney of Cook County, Illinois; the COUNTY OF COOK, a body corporate and politic; and ROBERT J. DEMPSEY, Judge of the Circuit Court of Cook County, Illinois,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 84 C 4781
Hon. Frank J. McGarr, *Chief Judge.*

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* The Honorable Eugene A. Wright, Senior Circuit Judge for the Ninth Circuit, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

(Letterhead Of)
OFFICE OF THE ASSESSOR
OF COUNTY OF COOK, ILLINOIS
Chicago 60602

CERTIFICATE OF ERROR PROCEDURE

The Certificate of Error is a procedure designed to correct an error in the assessment and is applied to your current tax bill. Although the Assessor has adjusted your tax bill the certificate will only serve as a recommendation to the Circuit Court of Cook County and must be approved by both the Board of Appeals and the Circuit Court. Thus, the Assessor cannot assure you of a favorable determination on your certificate. We can assure you that our preparation of your certificate will be handled as quickly as possible.

Having received a Certificate of Error you can either:

1) pay the taxes in full or
2) pay the adjusted amount shown on your bill

If you pay the full amount of your bill and your certificate is ultimately approved in court you will be entitled to a refund of the difference between the full amount and the adjusted amount.

If you pay only the adjusted amount of the tax the county records will continue to show the difference as an open item. This will result in periodic notices from the County Collector and the County Auditor drawing your attention to the unpaid balance until the matter is finally resolved in court. You may ordinarily disregard these letters because the certificate if properly posted will protect your property from a tax sale, but you may wish to check with our office when you receive one of these letters to verify that it is on the list. If you have not paid the full amount and the court ultimately denies approval of the certificate or reduces the amount of the reduction, you will owe the balance plus interest of one percent a month from the

original payment date. Since a final determination of your certificate may not be reached for two years the interest could be a significant amount.

It is important also that you understand that a Certificate of Error does not by itself correct the assessment for following years.

We are happy to assist you in correcting this problem and wish to thank you for bringing it to our attention.

Any further questions about your Certificate of Error or your assessment, should be directed to one of our deputies in the Homeowner's Assistance Department. If you wish to call, the number is 443-7550.

TCH:l

Re: 1980 Taxes unpaid in whole or in part due to Assessor's Certificate of Error

Dear Taxpayer:

The Annual Sale of 1980 real estate taxes has been rescheduled from February 1, 1982, to March 8, 1982.

YOUR TAXES WILL *NOT* BE OFFERED AT THE ANNUAL TAX SALE.

However, this is to notify you that the Office of County Assessor has granted you a Certificate of Error in the original 1980 assessment of your property. This Certificate of Error pertains either to a change of valuation on your property and/or the granting of a Homeowner's Exemption and/or a Homestead Exemption to Senior Citizens.

The Circuit Court of Cook County must now make the final determination as to whether approval will be granted concerning your Certificate of Error.

Under law, the Office of the County Collector is required to issue this written notice, and publish a notice that it will begin its Annual Sale of delinquent 1980 real estate taxes on Monday, March 8, 1982, after applying to the Circuit Court on Monday, February 22, 1982, for a Judgment and Sale Order.

THE TAXES ON YOUR PROPERTY WILL NOT BE OFFERED FOR SALE AT THIS ANNUAL SALE IF THERE IS AN UNPAID BALANCE, DUE TO A CERTIFICATE OF ERROR, AN OPEN ITEM ON YOUR TAX BILL AND THE STATUS OF ANY LIABILITY YOU INCUR WILL BE DETERMINED AFTER THE CIRCUIT COURT HAS HEARD YOUR CERTIFICATE OF ERROR CASE. YOU WILL BE ADVISED, ONCE THE CASE HAS BEEN HEARD, IF THERE HAS BEEN AN UNDERPAYMENT OR OVERPAYMENT.

If you have any questions, please call our Tax Sale Supervisor, Josephine Weiss at 443-6234.

EDWARD J. ROSEWELL
COOK COUNTY COLLECTOR
Chicago, Illinois 60602

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fourteenth Amendment, Section 1

. . . No State shall . . . deprive any person of life, liberty or property without due process of law . . .

Federal Statutes

28 U.S.C. §1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1341

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. §1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .

(4) To recover damages or to secure equitable or other relief under any Act of Congress for the protection of civil rights, including the right to vote.

28 U.S.C. §2201

(a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such

declaration, whether or not further relief is or could be sought. Any such declaration shall have the full force and effect of a final judgment and shall be reviewable as such.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges and immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Illinois Constitution

Article IX, section 4

(a) Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

Illinois Revised Statutes, 1983 Edition

Chapter 14, par. 5

§5. The duty of each State's Attorney shall be: . . .

(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county . . .

(12) To appear in all proceedings by collectors of taxes against delinquent taxpayers for judgments to sell real estate, and to see that all the necessary preliminary steps have been legally taken to make the judgment legal and binding.

Chapter 120, par. 604

§123. In counties containing 1,000,000 or more inhabitants, if, at any time before judgment is rendered in any proceeding to collect or to enjoin the collection of taxes based upon any assessment of any property belonging to any person or corporation, the county assessor shall discover an error or mistake in such assessment, such assessor shall execute a certificate setting forth the nature of such error, and the cause or causes which operated to produce it. The certificate when endorsed by the county assessor, or when endorsed by the county assessor and board of appeals where the certificate is executed for any assessment which was the subject of a complaint filed in the board of appeals for the tax year for which the certificate is issued, may be received in evidence in any court of competent jurisdiction. When so introduced in evidence such certificate shall become a part of the court records, and shall not be removed from the files except upon the order of the court.

A certificate executed pursuant to this Section may be issued to the person erroneously assessed or may be presented by the assessor to the court as an objection in the application for judgment and order of sale for the year in relation to which the certificate is made. The state's attorney of the county in which the property is situated shall mail a copy of any final judgment entered by the court regarding the certificate to the taxpayer of record for the year in question.

Chapter 120, par. 675

§194. (a) . . . If any person desires to object pursuant to Section 235 of this Act (Ch. 120, par. 716) to all or any part of a real property tax for any year, for any reason other than that the real estate is not subject to taxation, he shall pay, prior to the collector's filing his annual application for judgment and order of sale of delinquent lots and lands, all of the tax due and each payment shall be accompanied by a writing substantially in the following form:

Payment under Protest . . .

In counties having 1,000,000 or more inhabitants . . . any such written protest, whether of all or any part of a real property tax, shall be presented to the Collector at the time of payment of the second installment of said tax and at no other time.

The person paying real estate taxes under protest shall appear in the next application for judgment and order of sale and object to the taxes in relation to which the protest is made, and upon his failure to do so, the protest shall be waived, and judgment and order of sale entered for any unpaid balance of such taxes . . .

Chapter 120, par. 697

§216. The taxes upon real property, together with all penalties, interests and costs, that may accrue thereon shall be a prior and first lien on such real property, superior to all other liens and encumbrances, from and including the first day of January in the year in which the taxes are levied until the same are paid or until the real property is sold pursuant to this Act . . .

Chapter 120, par. 711

§230. Not less than 15 days before the date of application for judgment for sale of delinquent lands or lots, the county collector shall mail, by registered or certified mail, a notice or letter of the forthcoming application for judgment for sale to the person shown by the current collector's warrant book to be the party in whose name the taxes were last assessed. The notice shall include the intended dates of application for judgment and sale of such lands or lots. The county collector must present proof of such mailing to the court along with the application of judgment.

Chapter 120, par. 713

§232. The collector shall transcribe into a record prepared for that purpose, and known as the tax judgment, sale, redemption and forfeiture record, the list of delinquent lands and lots and of lands and lots upon which taxes have been paid under protest, which shall be made out in numerical order, and contain all the information necessary to be recorded, at least five days before the day on which application for judgment is to be made; which record shall set forth the name of the owner, if known; the proper description of the land or lot, the year or years for which the tax or in counties having a population of 1,000,000 or more inhabitants, the tax or special assessments, are due or for which the taxes have been paid under protest; the amount of taxes paid under protest; the valuation on which the tax is extended; the amount of the consolidated and other taxes or in counties having a population of 1,000,000 or more inhabitants, the consolidated and other taxes and special assessments; the costs and the total amount of charges against such land or lot. The record shall also be ruled in columns, so as to show the withdrawal of any special assessments from collection in counties having a population of 1,000,000 or more inhabitants and in all counties so as to show the amount paid before the rendition of judgment; the amount of judgment, and a column for remarks; the amount paid before sale and after the rendition of judgment, the amount of the sale, amount of interest or penalty, amount of cost, amount forfeited to the State, date of sale, acres or part sold, name of purchaser, amount of sale and penalty, taxes of succeeding years, interest and when paid, interest and cost, total amount of redemption, date of redemption, when deed executed, by whom redeemed, and a column for remarks, or receipt of redemption money. The tax judgment, sale, redemption and forfeiture record shall be kept in the office of the county clerk.

Chapter 120, par. 716

§325. The court shall examine the list, and if defense (specifying, in writing, the particular cause of objection) be offered by any person interested in any of the lands or lots, to the entry of judgment against them, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be: Provided, that no person shall be permitted to offer any such defense unless such writing specifying the particular cause of objection shall be accompanied by an official original or duplicate tax collector's receipt, showing that all taxes to which objection is made have been paid under protest pursuant to the provisions of section 194 of this Act (Chapter 120, par. 675); and it shall be the duty of all tax collectors to furnish such duplicate receipt without charge.

If any party objecting to any tax paid under protest is entitled to a refund of the amount, or any part thereof, so paid under protest, the court shall enter judgment accordingly. The court shall give judgment for such taxes and special assessments and penalties as shall appear to be due, and such judgment shall be considered as a several judgment against each tract or lot or part of a tract or lot, for each kind of tax or special assessment included therein; and the court shall direct the clerk to make out and enter an order for the sale of such real property against which judgment is given, which shall be substantially in the following form:

Whereas, due notice has been given of the intended application for a judgment against such lands and lots, and no sufficient defense having been made or cause shown why judgment should not be entered against such lands and lots, for taxes (special assessments, if any), interest, penalties and costs due and unpaid thereon for the year or years herein set forth, therefore, it is considered by the court that judgment be and is hereby entered against the aforesaid tract or tracts, or lots or lands, or parts of tracts or lots (as the case may be), in favor of the Peo-

ple of the State of Illinois, for the sum annexed to each, being the amount of taxes (and special assessments, if any), interest, penalties and costs due severally thereon; and it is ordered by the court that the said several tracts or lots of land, or so much of each of them as shall be sufficient to satisfy the amount of taxes (and special assessments, if any), interest, penalties and costs annexed to them severally, be sold as the law directs.

The order shall be signed by the judge . . .

Chapter 120, par. 751

§270. . . . Any order for the sale of real estate for delinquent taxes, except as otherwise provided in this Section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such order, and could have been presented as a defense to the application for such order in the court wherein the same was rendered, and as to all such questions, the order itself is conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or special assessments have been paid or the real estate was exempt from general taxes under this Act or was not subject to special assessment . . .